

Venezuela: Lessons of a Crisis Written on the Wall

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For the past 18 years, Venezuela has been accumulating all the ingredients – in its society, the State, the economy and democracy– to create a perfect storm.

Promises were made that the old problems would be resolved, differently and effectively, from outside the political system. Much of society felt that the breakdown of the bipartisan model of government by consensus, born from the 1958 *Punto Fijo* Pact, was responsible for the evils of corrupt politicians and political parties. The drop of the oil prices in the 1990s led to a series of necessary adjustments in the economy and, as always, it was the poorest who disproportionately paid the price.

In 1998, new hope appeared with the win by a charismatic leader, styled after the traditional military strongmen (*caudillo*) of the 19th Century: Army Lieutenant Colonel Hugo Chávez, leader of the attempted coup of 4 February 1992, who had been pardoned some years earlier by President Rafael Caldera. His promise was clear: a return to our historical roots, following the ideals of his heroes, to re-found a new Republic: the Fifth Republic of the Bolivarian Revolution. Many intellectuals and academic experts on the subject of Bolívar considered this a true contradiction that insulted the memory of the Liberator by manipulating his political ideals.

The Constitution represented a serious obstacle to the implementation of this task. One month earlier, in November 1998, senators and congressional deputies had been elected, and the new President's party had not won the majority. In addition, the separation and independence of the branches of power put limits on the revolution, which needed to find an alternative for its implementation. To that end, as soon the new President Chávez took office in February 1999, he decreed that a referendum would be held to ask the people if they approved the convocation of a National Constituent Assembly. The intention was to repeal the 1961 Constitution, which was the longest-standing in Venezuela's history, arguing that it, along with the traditional parties, were responsible for the country's ills. In other words, this repeal of the Constitution would be effected through a process other than the one provided within it (general reform), by resorting to the "original" constituent power. In this way, the cumbersome constitutional supremacy and rigidity was sidestepped, implementing a parallel procedure, not contemplated in the Constitution nor agreed between the political forces, but instead imposed by the vote of the majority as the holders of constituent power.

Although the Supreme Court of Justice had ruled in 1999 that the Constituent Assembly could not be considered as "original" or with absolute powers to adopt measures that would affect the current Constitution until a new constitution was approved, as soon as the said Constituent Assembly was elected and installed, it immediately declared itself "original", sovereign, and supra-constitutional. In this way, the only provisions that would remain in force from the 1961 Constitution were those that the Constituent Assembly would not repeal, and the Constituent Assembly empowered itself to enact legislation and decrees that changed or affected the organs of constituted power. In this way, the Constituent Assembly, after ratifying the President of the Republic in his position, intervened in the legislative branch (Congress) and the judicial branch, as well as the powers of the states (governors and legislative assemblies) and municipalities (mayors and city councils).

As of that moment, the Supreme Court stood down from upholding not only its own precedents, but those of the Constitution itself, and it endorsed the position that the Constituent Assembly was supra-constitutional. At that time, the then-President of the Supreme Court said that the court preferred to commit suicide rather than be murdered, and resigned from her position.

From then on, the way ahead was clear: for the executive to achieve its ends, it would be necessary to control the judiciary, ensuring that judges were not at the service of the law, but of the revolution.

The intervention in the judiciary was carried out through the constituent decree of "Judicial Emergency" that remained in effect for several years. This allowed a committee appointed by the Constituent Assembly to remove

tenured judges on grounds that were as vague as they were absurd, such as the fact that their judgments had been overturned repeatedly by higher courts, or having had three or more disciplinary complaints made against them. Afterwards, the Constituent Assembly created a Committee for Restructuring the Judicial Branch, which operated for almost six years, and which continued to remove judges arbitrarily, without effective judicial protection. At the same time, in December 1999, the Constituent Assembly appointed temporary members of the new Supreme Tribunal of Justice (STJ) and other heads of the branches of national public power, without following the procedures and requirements established in the nascent Constitution. By then, the deed had been done: the State was under the control of a constituent coup by the political party of the President of the Republic, and now it was guaranteed that it would loyally serve the true cause of the revolution.

Law would be at the service of the revolution, and no longer an obstacle to it. The revolution was the objective, and the law was an instrument at the service of the people, and therefore of their revolution. The law would be an expression of the revolutionary will of the people, and the operators of the law should understand and apply it thus. The leaders of the revolution, as the officials of a new State (the Bolivarian Republic), serving the people, embodied the revolution. In other words, the will of the highest leader became the will of the people. To pull this off, the role of judges would be essential in applying and guaranteeing that the law was unconditionally at the service of the revolution.

The new STJ began to convene public examination competitions to fill the vacancies for judges in the judiciary, but these procedures were soon suspended because, although qualified judges were approved, they were not loyal to the revolution. To solve this “dilemma”, the STJ created and appointed a powerful Judicial Committee made up of Supreme Court judges, which still exists and which is in charge of freely appointing and removing judges without the constitutional need to hold open competitions. There is a catch, one very important detail: these direct appointments of judges are done on a “provisional” basis, which is why, according to them and the new case law, at any time their appointments may be “left without effect”, meaning that these judges may be freely removed without cause, procedure, nor right to appeal.

In this way, a “new” revolutionary judicial branch was created, made up of judges at the loyal service of the revolution, most of them having little training, others being corrupt, and always under the scrutiny of those in power. If they do not serve the revolution faithfully, their services are immediately terminated. In this way, provisional judges became the regime’s preferred tool for persecuting social and political dissidence with the assurance that, if judges do not follow the political guidelines, their services would be terminated immediately. In the process, these judges became the guarantors of impunity for more than 90% of common crimes and 99% of crimes involving human rights violations.

Even the few remaining titular judges (judges with some level of security of tenure) were not spared under the new regime. The case of Judge Maria Lourdes Afiuni is perhaps the most emblematic of the consequences of making a ruling that is not in the political interest of the government. In ruling to release a person who had been held in pre-trial detention for more than two years – a situation that the UN Working Group on Arbitrary Detention had declared arbitrary, and demanded his immediate release – Judge Afiuni agreed to grant him conditional release during the trial, forbid him from leaving the country, and keep his passport. Less than an hour after deciding this alternative judicial measure, State security police arrested Judge Afiuni. The following day, on a national radio and television network, President Chávez demanded that she be jailed, tried and sentenced to the maximum of 30 years in prison. Judge Afiuni was imprisoned for more than two years, where she was raped in prison, and had to be taken out for emergency surgery. More than six years later, the State continues to persecute her, stalling on her case, with no grounds to convict her.

The STJ’s Constitutional Chamber has also been politically manipulated as a channel to expeditiously remove municipal mayors, disqualify them from holding public office, and prosecute and sentence them to prison, all in one single hearing. In response to the public protests that have been taking place since 2014, the STJ has issued precautionary measures requiring mayors to prevent these protests from taking place. When opposition mayors have respected citizens’ right to protest, the Constitutional Chamber has summoned them to hearings to demonstrate that they have complied with the injunction against protests. Within hours, the mayors have been sentenced to 12 to 15 months in prison, barred from politics, and stripped of office. To date, these unconstitutional and unconventional procedures have been used against 12 opposition mayors, even though the

United Nations Human Rights Committee has declared (in the case of *Mayor Scarano vs Venezuela*) that this violates several international human rights obligations under the International Covenant on Civil and Political Rights.

It is no coincidence that to sidestep its international law obligations, in 2012 Venezuela became the only country in Latin American to denounce the American Convention on Human Rights. It also withdrew from the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID).

The victory by the opposition (*Mesa de la Unidad Democrática* –MUD) in the legislative elections of 6 December 2015 gave rise to another decisive turn of the screw of autocracy, to bring it up to the point of a dictatorship. Again, the STJ was key in this political maneuver. With the opposition having won two thirds of the seats in the National Assembly, the STJ carried out a coup against the people's sovereignty and the national legislative body's constitutional powers. Using, abusing and manipulating the different procedural mechanisms of the STJ's Electoral and Constitutional Chambers, the executive branch and members of the government's party suspended three elected opposition legislators and annulled and rendered without effect all the laws that had been passed, as well as all calls for questioning and accountability by public officials, the approval of the national budget, the National Assembly's internal regulations, the administration of its own staff, and even the annual message by the President of the Republic before the National Assembly. The STJ's Constitutional Chamber overturned and hijacked all of the National Assembly's constitutional powers to legislate, investigate, exercise oversight and take internal administration action.

During 2016, in the midst of the crisis over food, medicine, inflation and security, the opposition decided to activate the people's right, provided in article 72 of the Constitution, to collect signatures in order to call a referendum to recall the mandate of the President of the Republic, Nicolás Maduro. In response, the electoral authority imposed a series of obstacles and restrictions on the collection of the necessary signatures. Once the signatures were collected, several criminal court judges simultaneously issued precautionary measures suspending the referendum in their states, and the National Electoral Council immediately seized the opportunity to suspend the recall referendum at the national level.

In December 2016, according to the Constitution, state elections had to be held for governors and state deputies, but the National Electoral Council did not convene these elections. Nor have municipal elections been convened in 2017 which, also according to the Constitution, should be held this year to elect mayors and city councillors.

With democracy and the Constitution suspended in Venezuela, the opposition and the international community began to demand that the government immediately hold elections, release political prisoners, respect the powers of the National Assembly, and open a humanitarian aid channel to provide food and medicine. The government and the opposition engaged in some dialogue by the end of 2016 but, as evidenced by the letter from Vatican Secretary of State, Monsignor Pietro Parolin, the government never fulfilled these commitments. In other words, the government again made a mockery of the attempts at dialogue and, in bad faith, stalled to gain time to crack down on public protests.

At the end of March 2017, Judgments 155 and 156 by the STJ's Constitutional Chamber rescinded parliamentary immunity and determined that, from now on, the National Assembly could not exercise any of its constitutional powers; which would now be exercised by whomsoever is appointed by the Constitutional Chamber. Both Venezuelan society and the international community pointedly declared that these "judicial" decisions constituted a coup, as a clear alteration of the constitutional regime that seriously impairs the democratic order. The role of the Attorney General of the Republic was decisive in raising this objection, despite the fact that, until that time, she had been a key figure of the Chavist regime. The March 2017 rulings ignited further public protests in Venezuela. The people felt that their right to their elected National Assembly had been seized from them, and that the country's problems were worsening.

Again, as in 1999, the Constitution was seen by the executive as an impediment. In response to the public outcry for general elections and respect for democracy and the Constitution, the government instead opted for a non-democratic and unconstitutional solution: a presidential decree convening a National Constituent Assembly (NCA), with voting jurisdictions to be made up of different "sectors" and territorial districts defined by the

government, but without any correlation to the population base. A Constituent Assembly that would not respect universal, direct, secret, free, and equal suffrage, in which the will of the majority of the people would be suppressed. The 1999 Constitution expressly stipulates (in article 347) that only the people can convene a NCA, as the holders of original constituent power. Hence, according to Venezuelan constitutional law and practices, which even President Chávez obeyed in 1999, the president of the republic may only propose the “initiative” (under article 348) to call for the people to decide in a referendum: (i) whether they want to convene a NCA to write a new Constitution; and (ii) to approve the proposed voting system and jurisdictions.

The STJ’s Constitutional Chamber immediately issued judgments upholding the President’s unconstitutional convening of a NCA, and the National Electoral Council unlawfully put it into motion, calling the election that took place on 30 July 2017. The opposition declined to participate in the election, refusing to legitimize an initiative that was blatantly contrary to the Constitution and democracy. On that day, government supporters elected the members of the NCA. Immense electoral fraud was reported, not only by the opposition, civil society, and the international community, but even by the company that has handled the electoral software for the National Electoral Council since 2003 (Smartmatic).

Once the NCA was installed, its first act consisted of receiving a communication from the STJ (which should have been sent to the National Assembly), notifying it that the Attorney General of the Republic (Luisa Ortega Díaz) had been suspended. Without any sort of trial, the NCA immediately proceeded to strip her of office, and in her place appointed Tarek W. Saab, former Ombudsman, former National Assembly deputy, and former state governor from the government’s party.

It is clear that the NCA is not interested in promptly drawing up a “new” Constitution, submitting it for approval by referendum, and then ceasing to function. The NCA has already stated that the 1999 Constitution will remain in force, except for the parts that the NCA declares void! Ergo, the Constitution is finished. In its place is a supra-constitutional “Leviathan” that can do anything and that has no boundaries of oversight, time, or subject matter. Obviously, the NCA has also forgotten that it should be bounded among other limits by human rights and its progressiveness.

All this is taking place, as in every dictatorship, in the face of rejection by the immense majority of the country’s citizens, and under daily public protests over the worsening social, economic, food, and health problems; but also under the most brutal government repression that the country has ever seen, with more than 100 dead, thousands injured, thousands arrested, and more than 500 civilians on trial before military courts.

The democratic world has awakened to this reality. Repudiation and calls for action are being made almost daily by the Secretary General of the OAS, the UN High Commissioner for Human Rights, the European Parliament, and the Inter-American Commission on Human Rights, among others. The American continent (with the exception of some Caribbean Islands) and Europe are expressing their democratic solidarity. The government’s reaction has been insults and isolation, becoming the only country in history to have denounced the Organization of American States (OAS) Charter.

How the Venezuelan crisis will end is not yet known. But hopefully it will end well, and soon, to give rise to the rebirth of democracy and prosperity for all. But neither Venezuelans nor the world should forget the lessons learned, among them that “any society in which the guarantee of rights is not assured, nor the separation of powers determined, has no Constitution” (article 16, French Declaration of the Rights of Man and of the Citizen); that a social (populist) State without the rule of law, ends with neither; and that the nature of this 21st Century revolution has been to politically sequester the powers of the State, particularly the judiciary, putting it at the unconditional loyal service of the revolution and turning it into the Constitution’s executioner. These are the lessons of a crisis that was written on the wall.

A Spanish version of this article has previously appeared on [Agenda Pública](#).

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